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Supreme Court, U.S.
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No. 00-1570

In The

Supreme Court of the United States

LOUIS WOZNIAK,

Petitioner,

v.

THOMAS F. CONRY, WILLIAM R. SCHOWALTER, LARRY R. FAULKNER, JAMES J. STUCKEL, and MICHAEL T. AIKEN, In Their Individual Capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Brown v. Armenti, ___F.3d___, 2001 WL 388752 (3rd Cir. 2001) 6

Conn v. Gabberg, 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999) 4

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) 6

Washington v. Glucksberg, 521 U.S. 702 (1997) 3

Washington v. Glucksberg, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) 4

STATUTES

20 USC § 1232(g) 6

ARGUMENT

The Court of Appeals' decision, renders tenure – a property right of long standing tradition and recognition – meaningless and subject to revocation at the whim of University Administrators. The Court of Appeals holds that no substantive due process right is implicated in the arbitrary, capricious, or factually unfounded removal of professorial responsibilities – teaching, research, advising students – since the property right at issue has not previously been construed by this Court as a "fundamental right." This holding leaves University Professors with only that protection afforded by procedural due process. The Court of Appeals' decision, however, holds that these professorial responsibilities are subject to revocation by an administrator simply by notifying the professor of an intent to do so, and affording that professor an opportunity to respond. The Court of Appeals' decision holds that the type of notice and opportunity to be heard which is required, is related to the property right at issue, and that the right to teach, conduct research, and advise students, is of lesser constitutional dimension and significance than the right to retain the title of Associate Professor, and the right to retain a salary. Thus, under the scheme envisioned by the Court of Appeals, the removal of professorial responsibilities can be effectuated simply by advising the professor of an intent to do so, and affording that professor an opportunity to respond (even though the decision has already been made) so long as the University continues to pay the professor's salary and permit him or her to retain the title previously held. The Court of Appeals' decision places no value upon the right to conduct research, teach, or advise students, and fails to

recognize that the removal of one's professorial responsibilities, effectively terminates one's career.

In assessing the impact of the Court of Appeals' decision, one must be guided by the fact that procedural due process affords no substantive impediment to the evisceration of the long standing property rights commonly referred to as tenure, and thus the arbitrary, capricious, and unfounded destruction of a career is rendered non-actionable simply by providing notice of one's intent to do so, and offering an opportunity to the professor to respond to that decision.

The Respondents characterized the Court of Appeals' decision with respect to the substantive due process issue as follows: "The Court held that Petitioner had no substantive due process right to teach without following the University's grading rules." (Brief in Opposition at 4) Thus, according to the Respondents, substantive due process rights exist or evaporate depending upon whether the University rules had been followed or not. This interpretation of substantive due process is clearly erroneous. If there is a substantive due process right, it exists independent of whether there is an allegation that the professor failed to follow University rules. The failure to follow such rules is relevant to whether the decision is arbitrary, capricious, or wholly without a basis in fact, but it is not relevant to whether the right exists in the first instance. Additionally, Respondents' efforts to describe the departure by the Court of Appeals for the Seventh Circuit from established tradition and precedent as "marginal," can only be construed as an effort to minimize the import of this decision so as to avoid its review by this Court. Contrary to the repeated assertion, at page 7 of the

Brief In Opposition, the Seventh Circuit did not hold that the Petitioner did not have a substantive due process right to teach "without following the lawful policies of the University on grading." Instead the Court held that there is no substantive due process right associated with tenure since this long standing property right has not been construed to be a "fundamental right." Clearly, the Respondents and the Petitioner read this Court's decision in *Washington v. Glucksberg,* 521 U.S. 702 (1997), differently. The Petitioner asserts that this Court did not intend to remove from substantive constitutional protection, employment related property rights, including tenure. As noted by the Petitioner, substantive due process has historically been, in some instances, the only barrier to arbitrary and capricious decision making wholly unsupported in fact. Notwithstanding that, in a singular paragraph, the Court of Appeals unequivocally denies the application of substantive due process rights in the employment context by its assertion that substantive due process applies only to decisions affecting "fundamental rights."

The Respondents' acknowledgment that substantive due process historically, and traditionally, afforded protection of property rights even in the employment context, is directly at odds with the effect of the Court of Appeals' decision to interpret tenured property rights as matters simply of administrative grace. The Respondents' substantive due process argument further fails with the acknowledgment that the Record clearly reflects that the University of Illinois did not have in place, the "grade book" policy which serves as the foundation for each of the Respondents' arguments herein, and without which

each of those arguments must fail. Finally, the Respondents wholly fail to acknowledge that in *Washington v. Gluckberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), and subsequently in *Conn v. Gabberg*, 526 U.S. 286, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999), that this Court has consistently reaffirmed the application of substantive due process in the employment context. Petitioner's substantive due process claim was entitled to be determined by a jury and it should not have been prematurely aborted – as a matter of law – by the Courts below.

Petitioner procedural due process claims were similarly entitled to be heard on the merits. Respondents assert that the previous "punishment" argument, and its legal consequences, were not presented to the Seventh Circuit (*Brief In Opposition*, at 5). That assertion is simply incorrect. This issue was raised in the Reply Brief submitted to the Court of Appeals, as a result of the Respondents having raised – for the first time – an assertion that notice and an opportunity to be heard were actually afforded to the Petitioner. In fact, as reflected in the initial Brief filed with the Court of Appeals (at 25), the Respondents never contended below, that Plaintiff was ever afforded notice or an opportunity to be heard regarding the removal of his professorial responsibilities either pre-termination, or post-termination. Once that issue was raised by the Respondents in their Brief before the Court of Appeals, however, it was responded to, and the issue was argued extensively during Oral Argument before the Court of Appeals. The Record below clearly reflects that the Petitioner was never afforded an opportunity to be heard with respect to whether his professorial responsibilities were going to be removed, and that that issue

had been resolved more than six months earlier by sanctions imposed on February 21st. The assertion by the Petitioners to the contrary (*Brief In Opposition*, at page 7), is incorrect and misleading. The intervention of an Associate Dean and the communications with the Chancellor's Office were with respect to reviewing the underlying dispute and **not** with respect to the removal of the Petitioner's professorial responsibilities. It is noteworthy that the Respondents do not contest the Petitioner's entitlement to procedural due process – notice and an opportunity to be heard – but merely claim that such process was afforded to him. To the extent that this acknowledgment renders the procedural due process claim a disputed factual issue, review by this Court would normally be unwarranted. In light, however, of the Court of Appeals having affirmed the resolution of disputed issues of fact rather than permitting a jury to determine that factual dispute absent intervention by the Court, the District Court's assertion that a Plaintiff's affidavit is entitled to less weight than a Defendant's (Petitioner's *Petition For Writ of Certioriari* at Appendix 15 to 16), will remain intact, and current and future litigants will be deprived of the substantial and significant right to a jury trial as a result of the District Court having assumed the responsibility as the trier of fact in each case.

The Record below also reflects that Vice-Chancellor Faulkner, when interviewed publicly, concerning these issues, could not name a singular University department which required grade books to be submitted. During that interview, Vice-Chancellor Faulkner further stated that he would not support a resolution which required submission of grade books. Contrary to Respondents' assertions,

there was no grade book policy, and thus it is both misleading and inaccurate to suggest as the Respondents do, at page 6 of the Brief in Opposition, that "Petitioner does not contest that he refused to follow the grading policy."

Finally, with Respect to Petitioner's First Amendment Claim, the fundamental underlying issue – whether academic freedom with respect to grades lies in the Professor or the University as an institution – places the Seventh Circuit, and now the Third Circuit Court of Appeals (*Brown v. Armenti*, ___ F.3d ___, 2001 WL 388752 (3rd Cir. 2001), squarely at odds with the recognition afforded to Professors by the Sixth Circuit's decision in *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989). The Court of Appeals affirmance of the dismissal of Plaintiff's First Amendment claim, ignores the public discourse concerning this issue, and the allegations of Plaintiff's Complaint which alleged that the Plaintiff was retaliated against as a result of that public discourse. The American Association of University Professors, and the Family Educational and Privacy Rights Act (20 USC § 1232(g)), acknowledge the student's privacy interests in educational records, and the Courts below erred in finding – as a matter of law – that University Administrators are entitled to retaliate against the Plaintiff for having engaged in public discourse concerning those privacy rights on the basis that he lacked "standing" to do so. (*Petition for Certiorari*, Appendix at 5-6). Contrary to the assertion of the Court of Appeals, it is not simply the students who are entitled to raise, and address publicly, an invasion of their privacy and federally guaranteed rights. The Petitioner, as their professor,

had an obligation to do so, and the interjection of "standing" as a requirement in First Amendment analysis, is without precedent. Furthermore, it eviscerates the long standing recognition that retaliation by the Government for the exercise of First Amendment (free speech) rights, is actionable.

CONCLUSION

As reflected in the *Petition for Writ of Certiorari*, and in this Reply to Respondent's *Brief in Opposition*, it is clear that it is the concept of academic tenure, and the long standing tradition of the rights attendant thereto, which are under attack by the Respondents in this case, and which the Court of Appeals' decision, converts to matters simply of administrative grace. Neither notice nor an opportunity to be heard was afforded to the Petitioner prior to the removal of his professorial responsibilities, and until the filing of the Respondents' Brief in the Seventh Circuit Court of Appeals, the Respondents had never contended that any constitutionally sufficient notice or opportunity to be heard, was afforded to the Petitioner. Perhaps more importantly, however, is the Court of Appeals' interpretation of this Court's substantive due process analysis, and the elimination of that right as a check against arbitrary, capricious, and unsupported in fact decision making in the employment context.

Finally, the interjection of a "standing" requirement in the context of a First Amendment retaliation claim, is wholly without support in any precedent of this, or any

other, Court and raises a new and profound barrier to the First Amendment rights of the citizenry of this country by interjecting into the equation an inquiry as to whether the speaker is a person who is entitled to speak out on a matter at issue which would otherwise be entitled to First Amendment protection.

The Petitioner respectfully prays that this Court grant his *Petition for Writ of Certiorari* and that thereafter, the judgment of the Seventh Circuit Court of Appeals, be reversed with further proceedings to be afforded to the Petitioner consistent with this Court's Opinion, in the District Court.

Respectfully submitted,

LOUIS WOZNIAK,
Petitioner

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